IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1979
No. 78-1007

H. EARL FULLILOVE, et al.,

Petitioners,

-against-

JUANITA KREPS, Secretary of Commerce of the United States of America, et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENTS THE CITY OF NEW YORK, THE NEW YORK CITY BOARD OF HIGHER EDUCATION, and THE NEW YORK CITY HEALTH and HOSPITALS CORP.

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STATEMENT

This case involves the exercise of Congressional power pursuant to the

Spending and Commerce powers and the Thirteenth and Fourteenth Amendments of the Constitution to eradicate and remedy the effects of past discrimination and to assure future equal opportunity. More particularly, it involves a short term, carefully limited Congressional attempt at achieving equal opportunity in the construction industry, an industry long resistant to integration efforts.

In 1977, Congress enacted the Public Works Employment Act ["PWEA"] (Pub. L. 95-28, 91 Stat. 116), which amended the Local Public Works Capital Development and Investment Act of 1976, Pub. L. 94-369, 70 Stat. 997. In the PWEA, Congress included a provision, section 103 (f)(2), 42 U.S.C. §6705(f)(2), requiring that 10% of any grants under the program be awarded to qualified minority business

enterprises ["MBE set aside"]. Localities in which there were insufficient minority business enterprises to fulfill the requirements of this provision were permitted to apply for a waiver, and still participate fully in the grant process.

The petitioners claim that the MBE set aside is unconstitutional as violative of the equal protection guarantee secured under the Fifth Amendment. We address that contention in this brief.*

*Petitioners also argue that this Congressional action should be struck down because of a claimed violation of an earlier enacted statute, Title VI of the Civil Rights Act of 1964. 42 U.S.C. §2000d (1976). Because we believe this argument is frivolous, and in any event will be fully answered in the Solicitor General's brief, we do not burden this Court with our response to it.

SUMMARY OF ARGUMENT

We argue, first, that, notwithstanding the MBE provision in the PWEA according a preference to minority contractors, because this legislation involves an area of special competence and discretionary authority of Congress, it is not subject to the same level of strict scrutiny that would be required were this action taken by some other body or officer. Since this legislation reasonably serves an overriding national interest in remedying identifiable past and continuing discrimination, it should, without more, be upheld as constitutional.

We next argue that, even assuming this legislation must satisfy a strict scrutiny test, it is not violative of the guarantee of equal protection of the laws secured under the Fifth Amendment. The MBE provision in the PWEA is addressed to a problem of compelling national interest, to wit, pervasive and persistent discrimination in the construction industry, and is sufficiently limited, as to both the scope of the MBE program and its duration, to meet any objection that it unnecessarily burdens others. With respect to the petitioners' argument that this legislation was not accompanied by sufficient findings of discrimination, we point out that Congress is not required to make the sort of finding

that a court or other body or officer would have to make before ordering a remedy of this type and that, in any event, Congress has, over the past decade and a half, been investigating and debating the problem of racial discrimination in this country. Thus, Congress was fully competent to determine that discrimination existed in the construction industry which required remedying. As to petitioners' argument that the MBE set aside is not the least restrictive remedy available to achieve Congress' purpose, we point out that Congress has broader powers than the courts in fashioning remedies for discrimination, and, further, that, in fact, the alternative remedies suggested by petitioners are not realistic.

ARGUMENT

SECTION 103(f)(2) OF THE PUBLIC WORKS EMPLOYMENT ACT OF 1977 IS A CONSTITUTIONAL EXERCISE OF CONGRESSIONAL POWER

The most compelling criticism directed at the MBE set aside is that it accords an economic preference based on race. Indeed, quotas and set asides on a purely ethnic basis are foreign to the expressed policy of the City of New York. We have consistently refused to set aside tax levy monies specifically based on race, religion, national origin or sex, or to impose quotas in structuring the City work force. Apart from the fact that the same would conflict with the City's expressed policy, it is our opinion that the City does not have the legal authority to take such action, nor would there be any basis for requiring the City

to do so based upon the City's record in this area. The foregoing notwithstanding, we nonetheless urge that Congress has properly determined that a set aside is the effective remedy for an entrenched system of discrimination in the construction industry. We submit that this Court has no alternative but to uphold that determination. We base our position not only upon what we believe to be the essential justice of the remedy Congress has chosen for this particular discrimination, but also upon traditional approaches to determining the constitutional validity of Congressional enactments.

(1)

Petitioners argue that this Court must apply the same standard of review to this act of Congress that was applied to the actions of a state

university in Regents of the University of California v. Bakke, 438 U.S. 265 (1978) (Pet. Br. 8-10), that is, a standard of "strict scrutiny."

This argument ignores the crucial fact that here it is Congress which has acted. This Court has long recognized the "special competence of Congress to make findings with respect to the effects of identified past discrimination and its discretionary authority to take appropriate remedial measures." Bakke, supra, 438 U.S. at 302, n. 41. See also Hampton v. Mow Sun Wong, 426 U.S. 88, 103 (1976).

In Hampton, supra, the Court stated that, where the subject of the challenged Congressional legislation was one of "overriding national interest," a discriminatory rule, invalid

if adopted by a state, would be held to be valid when adopted by Congress, if there was a "legitimate basis for presuming that the rule was actually intended to serve that interest." 426 U.S. at 103. In reviewing such a rule, the Court would infer that "any interest which might rationally be served by the rule did in fact give rise to its adoption." Id.

That is precisely the case with the PWEA, and its MBE set aside. The PWEA deals with issues of overriding national concern: to wit, the depressed state of the national economy, and, with respect to the MBE set aside, the national interest in giving force and effect to the Thirteenth and Fourteenth Amendments. The PWEA was initially

conceived to address the "most serious economic recession since the Great Depression," H.R. Rep. No. 95-20, 95th Cong., 1st Sess. 1 ["H.R. Rep."]* and the MBE set aside was, clearly, designed to address obvious problems of racial discrimination and minority underrepresentation in a significant sector of our national economy.

Where Congress has legislated to end racial discrimination, this Court has acknowledged the very broad power of Congress. In Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964), the Court upheld Congressional power under the Commerce Clause** to prohibit racial dis-

*Reprinted in [1977] U.S. Code Cong. & Ad. News 150, 150.

**U.S. Const., art. I, § 8, cl. 3.

crimination in public accommodations by private parties. Id. at 261. In Katzenbach v. Morgan, 384 U.S. 641 (1966), Congressional power under section 5 of the Fourteenth Amendment* was determined to be coextensive with its power under the Necessary and Proper Clause.** Id. at 650. In United Jewish Organizations, Inc., v. Carey, 430 U.S. 144 (1977) ["UJO v. Carey"], this Court upheld New York State's power to use racial criteria to provide greater nonwhite representation, because the state measure was effected to comply with the Voting Rights Act and to assure equal access to the franchise. Id. at 261.

*U.S. Const., Amend. XIV, § 5.

**U.S. Const., art. I, §8, cl. 18.

A legislative enactment such as the PWEA, specifically intended to remedy the depressed state of the economy, is a traditional exercise of Congress' Commerce Power. The MBE set aside, as one of many preferences included in the PWEA, is valid both under the Commerce Clause, because of Congress' determination that MBE's were being excluded from federal contracts, and under section 5 of the Fourteenth Amendment, because the PWEA provides a remedy for historically established racial discrimination.

Where a challenged statute involves a decision by the federal government to "spend money to improve the general public welfare," Mathews v. deCastro, 429 U.S. 181, 185 (1976), the de Castro and

other decisions of this Court* establish that the wisdom of such a determination is "not confided to the courts," Helvering v. Davis, 301 U.S. 619, 640 (1937), because Congress is the "institution charged under our scheme of government with the primary responsibility for making such judgments." Califano v. Goldfarb, 430 U.S. 199, 210 (1977). Only if the challenged classification fails to "rationally further some legitimate governmental interest," United States Department of Agriculture v. Moreno, 413 U.S. 528, 532 (1973), is invalidation appropriate.

*See, e.g., Califano v. Torres, 435 U.S. 1 (1978); Califano v. Jobst, 434 U.S. 47 (1977); Mathews v. Diaz, 426 U.S. 67 (1976); Weinberger v. Salfi, 422 U.S. 749 (1975); Dandridge v. Williams, 397 U.S. 471 (1970). The Spending Clause, U.S. Const., art. I, § 8, cl. 1, is the source of Congressional power where appropriations to promote the general welfare are in issue.

In addition to the principal purpose of the 1976 PWEA to stimulate the economy, the 1977 act had additional purposes: to "do a better job of," inter alia, "[i]nsuring a more equitable distribution of projects," "[s]implifying administration" and "[r]eflecting local priorities." H.R. Rep., supra, at 3. To meet these additional objectives, a number of preferential provisions were included in the 1977 PWEA, of which the MBE set aside was but one.* Petitioners'

*Priority was given to projects designed to conserve energy, local government projects and local school district projects (section 106, 42 U.S.C. § 6707(b)(2), (3) and (4)); and projects involving health care and rehabilitation facilities (section 108, 42 U.S.C. § 6707(j)). Also, provisions were included requiring hiring preferences for Vietnam veterans and disabled veterans (section 104(f), 42 U.S.C. § 6706); requiring that projects provide for accessibility by the handicapped (section 103(g), 42

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brief discusses the MBE set aside without any reference to these other provisions of the PWEA, which furnish clear evidence that Congress intended thereby to advance a variety of national priorities.

Because the PWEA, including the MBE set aside, is an exercise of plenary Congressional power under the Commerce and Spending Clauses and section 5 of the Fourteenth Amendment, it is a valid legislative enactment if it meets the standards articulated by this Court

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U.S.C. § 6705(g)); protecting job opportunities for citizens and legal residents by explicitly prohibiting employment of illegal aliens (section 103(e)(2), 42 U.S.C. § 6705(e)(2)); providing for stimulation of other industries by expressly requiring that only American products be used in construction (section 106(f)(1)(A), 42 U.S.C. § 6705(f)(1)(A)); providing for a 2 1/2 per cent set aside for projects in Alaska Native Villages and Indian Tribes (section 105, 42 U.S.C. § 6707(a)).

in reviewing previous acts of Congress under these powers. Because of Congress' special competence in this area, if the interests are legitimate, and the means are plainly adapted to further those interests, the legislation is valid. Heart of Atlanta Motel, supra, 379 U.S. at 261-62; de Castro, supra, 429 U.S. at 185; Katzenbach v. Morgan, supra, 384 U.S. at 650. This standard is met by the legislative objectives of the PWEA and the means chosen to achieve them.

(2)

Even assuming here the applicability of a strict scrutiny test, the MBE set aside is constitutional. The provision serves a compelling interest and is sufficiently narrow to further Congress' objectives without unnecessarily burdening others.

In enacting the MBE set aside, Congress intended to remedy past racial discrimination in the construction industry, a compelling governmental interest. Petitioners do not contest Congress' authority to legislate remedies for past discrimination. They find fault only with what they consider to be a paucity of legislative history precisely tied to the enactment of the MBE provision (Pet. Br. 11-12), and then conclude that Congress has failed to meet the Bakke test (Pet. Br. 12-13). In Bakke, however, the Court did not purport to limit Congressional power to act in the area of racial discrimination; that issue was not before it. Rather, it rejected the competence of the Davis Medical School to make such

findings because, "in establishing a racial classification, a governmental body must have the authority and capability to establish, in the record, that the classification is responsive to identified discrimination," 438 U.S. at 309 (emphasis added). Congress most certainly has such "authority and capability"; such is the clear import of section 5 of the Fourteenth Amendment.*

*To state that Congress has such authority, or power, is by no means to suggest that this power should be exercised in a particular way. Congress' determination as to whether to adopt a particular measure is peculiarly political; it must take into account political and pragmatic considerations. In this, Congress' role is very unlike that of the courts, which, at least generally, are charged merely with responsibility for construing and applying received law.

There is no legal authority for petitioners' narrow position that, to survive constitutional scrutiny, a Congressional remedy for discrimination must be accompanied by detailed legislative findings. Congress does not have to investigate de novo each time it acts in an area which it has already scrutinized at length. In the case at bar, the Court of Appeals set forth an extensive list of legislation enacted by Congress "during the past decade and a half for the benefit of those minorities who have been victims of past discrimination." 584 F.2d at 605 & n.7. See also Rhode Island Chapter v. Kreps, 450 F. Supp. 338, 352-56 (D.R.I. 1978); Ohio Contractors Association v. Economic Development Administration, 452 F. Supp. 1013, 1022 & n.7 (S.D. Ohio 1977), aff'd,

580 F.2d 213 (6th Cir. 1978); Constructors Association of Western Pennsylvania v. Kreps, 441 F. Supp. 936, 951-52 & n.8 (W.D. Pa. 1977), aff'd, 573 F.2d 811 (3rd Cir. 1978). Moreover, federal courts, in upholding the affirmative action plans required of federal construction contractors under Executive Order 11246, have found that the federal government's intent under 11246 was to remedy past racial discrimination in the construction industry. Two such decisions, Associated General Contractors of Massachusetts, Inc. v. Altschuler, 490 F.2d 9 (1st Cir. 1973), cert. denied, 416 U.S. 957 (1974), and Contractors Association of Eastern Pennsylvania v. Secretary of Labor, 442 F.2d 159 (3d Cir.), cert. denied, 404 U.S. 951 (1971), are cited with approval in Bakke, supra, 438 U.S. at 301-02. To

condemn the MBE set aside because Congress did not begin anew to consider whether minorities had been discriminated against in the construction industry would place an overwhelmingly restrictive limitation upon Congress' ability to act under its conceded constitutional powers.

Petitioners' further argument that there has been no finding that white contractors have discriminated against MBE's (Pet. Br. 13), and therefore a remedy imposing a burden on white contractors fails to meet the Bakke test (Pet. Br. at 15), must be rejected. Although Congress has itself recognized that account should be taken of the legitimate expectations of parties, and burdens should not be unfairly imposed on innocent parties, see, e.g., section 703(h) of Title VII of the Civil Rights Act of 1964,

42 U.S.C. §2000e-2(h), nevertheless, effective remedies in many instances will necessarily have an impact on specific persons who were not in any sense guilty of discrimination. Thus, in Franks v. Bowman Transportation Co., Inc., 424 U.S. 747, 774 (1976), the Court recognized that affirmative relief there ordered against an employer "diminishe[d] the expectations of other, arguably innocent, employees." Such expectations, it noted, may be modified by statutes where there is "a strong public policy interest in so doing." Id. at 778.

Petitioners cannot take issue with the fact that racial discrimination in employment in the construction industry has been rampant and relatively impervious to legislative and judicial remedies. In the New York City con-

struction industry alone, there have been a plethora of such findings, dating back to 1964 and continuing to the present.* These cases have found discrimination by unions and contractors by exclusion of racial minorities from training and

*See, e.g., EEOC v. Sheet Metal Workers Local 28, 401 F. Supp. 467 (S.D.N.Y. 1975), aff'd as modified, 532 F.2d 821 (2d Cir. 1976), rev. order aff'd, 565 F.2d 31 (2d Cir. 1977); EEOC v. Operating Engineers Locals 14 and 15, 415 F. Supp. 1155 (S.D.N.Y. 1976), aff'd in part, rev'd in part, 553 F.2d 251 (2d Cir. 1977); Rios v. Enterprise Ass'n Steamfitters Local 638, 360 F. Supp. 979 (S.D.N.Y. 1973), aff'd as mod., 501 F.2d 622 (2d Cir. 1974); United States v. Wood Wire and Metal Lathers Local No. 46, 341 F. Supp. 694 (S.D.N.Y. 1972), aff'd, 471 F.2d 408 (2d Cir.), cert. denied, 412 U.S. 939 (1973); EEOC v. Operating Engineers Locals 14 and 15, 438 F. Supp. 876 (S.D.N.Y. 1977); State Comm'n of Human Rights v. Farrell, 43 Misc. 2d 958, 252 N.Y.S.2d 649 Sup. Ct. N.Y. Cty. 1964).

employment in the construction industry.* See also United Steelworkers of America v. Weber, ___U.S. ___,

*By executive order and regulations the City of New York, within the limits of its competence and authority in this area, has taken positive steps to remedy the problem of minority underemployment in the construction industry. This has taken the form of the City's requiring its construction contractors to attempt to meet minority employment goals. The industry, including both the contractors and the unions, has continually resisted this City initiative. See, Broidrick v. Lindsay, 39 N.Y.2d 64, 350 N.E.2d 595 (1976); Fullilove v. Beame, Sup. Ct., New York County, May 11, 1977, Index No. 1673/77 (invalidating regulations promulgated subsequent to Broidrick v. Lindsay), aff'd 64 A.D.2d 961, 409 N.Y.S.2d 121 (1st Dep't 1978), app. pending. See, also, Fullilove v. Carey, 62 A.D.2d 798, 406 N.Y.S.2d 888 (3d Dep't 1978), app. pending.

99 S.Ct. 2721, 2725 n.1 (1979).*

It is a patently logical inference that the inability of racial minorities to be employed in the construction industry has resulted in their failing to gain the capital and experience

*In State Comm'n of Human Rights v. Farrell, 43 Misc. 2d 958, 252 N.Y.S.2d 649 (Sup. Ct. N.Y. Cty. 1964), the court found in 1964 that of 3300 members and 430 apprentices in the Sheet Metal Workers Local 28, there was not one Negro member and there never had been, id. at 960, 252 N.Y.S.2d at 652, and ordered broad affirmative relief, id. at 966-69, 252 N.Y.S.2d at 657-60. Thirteen years later, in EEOC v. Sheet Metal Workers Local 28, 565 F.2d 31 (2d Cir. 1977), the Court of Appeals found that between 1959 and 1975 Local 28 had admitted only 24 additional journeymen to its union, all white, even though 15% of the applicants had been nonwhite, id. at 33, and again broad affirmative relief was ordered, id. at 34-36.

to successfully become contractors.* Indeed, petitioners concede as much. In their discussion of "less drastic means," petitioners point out that "[o]ne of the greatest sources of training for persons entering into the business market for the first time is to learn from the experience of those already there or who have been there" (Pet. Br. 27), and that one of the reasons minority contractors fail is that they do not have the capital to meet the

*See Rhode Island Chapter, supra, 450 F. Supp. at 356:

> Barriers to work on construction projects, in turn, may well decrease the number of minorities sufficiently experienced to begin their own construction firms. Congress could reasonably infer that the lack of minority business enterprises was caused in part by the past discrimination in related unions documented in case after case.

high cost of security bonds (Pet. Br. 28-29). Had racial minorities not been excluded solely on the basis of race from the opportunity to obtain such experience on the job, it could be expected that minorities would not be as underrepresented among the ranks of contractors as they are today. Congress has not acted indiscriminately by attempting to ameliorate this harsh effect of employment discrimination by providing the remedy of a MBE set aside. Moreover, to directly attack the continued problem of discrimination in employment in the construction industry, Congress does not act without justification when it concludes that MBE's would not exclude racial minorities from employment on the basis of race from federally

financed construction projects, as white contractors historically have. Compare Rhode Island Chapter, supra, 450 F. Supp. at 358.*

In light of the documented history of race discrimination in the construction industry, and because Congress acts with a "special competence" in identifying past discrimination, Bakke, supra, 438 U.S. at 302 n.41, there can be no question but that Congress' action in enacting the MBE set aside was justified by a compelling government interest.

(3)

Assuming still that this Congressional enactment is subject to

*Conversely, we do not understand the MBE set aside to sanction reverse discrimination by minority employers. MBE employers are as much bound by antidiscrimination statutes as are other employers.

the strict scrutiny test, the second prong of that test requires examination of the means used by the legislature to accomplish its objective. Shelton v. Tucker, 364 U.S. 479, 488 (1960); Loving v. Virginia, 388 U.S. 1, 11 (1966). In the case at bar, the petitioners urge, in effect, that for this legislation to survive scrutiny Congress would have have had to make findings similar to what a court or administrative agency would be required to make in order to justify ordering similar relief. But that is not the law. Congress has the power to act on a broader scale than that afforded a court:

> Congress necessarily acts on a level of generality, both in its fact-finding and the scope of its remedies, far beyond that appropriate to a court

> limited to the case or controversy at bar. Thus, it would be inappropriate, in fact impossible, to require Congress to make judicial-like findings of discrimination before it could enact remedies that employ racial quotas.

Rhode Island Chapter, supra, 450 F. Supp. at 354. Accord, Ohio Contractors Association, supra, 452 F. Supp. at 1022. In Katzenbach v. Morgan, supra, 384 U.S. at 656, this Court affirmed Congress' prerogative to weigh alternative remedies. "[I]t is enough that we perceive a basis upon which Congress might predicate a judgment." In UJO v. Carey, supra, 430 U.S. at 156, this Court again affirmed Congress' prerogative to choose remedies for racial discrimination more efficient and stringent than case-by-case determinations could provide. By choosing the MBE

set aside, Congress exercised its prerogative in an area where it has a "specially informed legislative competence." Katzenbach v. Morgan, supra, 384 U.S. at 656. See also Bakke, supra, 438 U.S. at 302 n.41.

Petitioners' argument that Congress should have chosen a method less restrictive than a set aside when attempting to remedy past discrimination in the construction industry (Pet. Br. 24-31) is disingenuous. They ignore that part of the strict scrutiny analysis that permits a more restrictive means if necessary to accomplish the legitimate objectives of the legislation. If the end is legitimate, a "less drastic" means is necessary only "when the end can be more narrowly achieved." Shelton v. Tucker, supra, 364 U.S. at 488. Petitioners' alternatives

are, of course, less drastic than that selected by Congress, but such less drastic "means" are a chimera. Less drastic means of attempting to eradicate and remedy discrimination in the construction industry have been attempted repeatedly and continuously over the past decade and a half. They have all failed.* Indeed, such is the record of this industry that it is impossible to believe that petitioners' suggestions

*See Brief for Defendant-Appellee Juanita Kreps, United States Court of Appeals for the Second Circuit, Appendix A, listing several pages of federal programs providing financial assistance, marketing assistance, business management assistance and other types of assistance geared to aiding minority businesses. See also Constructors Association of Western Pennsylvania v. Kreps, supra, 441 F. Supp. at 951 n.8. The failure of "less drastic" remedies to produce the desired result is self-evident in the finding by Congress that MBE's participate in only 1% of federally funded construction projects.

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of less drastic means are seriously proffered.

Certainly, the Reconstruction Era Congress which debated the Fourteenth Amendment could not have foreseen that racial discrimination would be as long lived in our society as it has proved to be. Since the enactment of the Civil Rights Act of 1964, Congress has again focused its attention on this pervasive, intractable problem. It is not insensitive to all that petitioners here urge, but it is also not blind to the need to take

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Senator Brooke and Representative Mitchell, in introducing the MBE set aside in the Senate and House, respectively, each noted that fact. See 123 Cong. Rec. S.3910 (daily ed. March 10, 1977); 123 Cong. Rec. H.1465 (daily ed. Feb. 24, 1977).

meaningful measures to eradicate and remedy persistent discrimination.

In enacting the PWEA of 1977 Congress did not act rashly or radically. Rather, in a limited context and for a very short period, it directed that affirmative steps should be taken to remedy past discrimination. Although we believe that the imposition of a racial quota is a drastic remedy, even a remedy of last resort, in this instance it was fully justified. This Congressional action, long overdue in this industry, should be held entirely lawful.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

October 8, 1979

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